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FIRST REPORT ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

By

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INTRODUCTION

1. The Special Rapporteur is firmly convinced that by elaborating an instrument along the lines of the draft that emerged after completion of the first reading, the Commission will be making a significant contribution towards ameliorating some of the water-related problems humankind will confront in the next few decades as a result of increased use and needs generated by the drive for development and the expanding population.

2. The Special Rapporteur owes an incalculable debt to his predecessor Professor McCaffrey, to those who preceded Professor McCaffrey, to Professor Hayton and to the members of the Commission who worked so hard to complete the first reading in a timely fashion. A standard has been set which the incumbent regards as more aspirational than achievable.

3. The Special Rapporteur believes that what is necessary at this stage is, in large measure, fine tuning. In sum, the Special Rapporteur sees no basis to disagree with the written comments of one Government that "the draft is a remarkable achievement". This is not to deny that not all States were equally affirmative or that there was a tendency of some States to pull or push the draft one way or another depending, inter alia, on their respective geographic situations vis-à-vis key watercourses. Questions have, moreover, been raised as to the final form the Commission's product should take, and several States have urged that the Commission reconsider the question of including provisions for the settlement of disputes.

4. There have, of course, been developments in the world since the Commission completed its first reading. In this connection, particular reference is made to the work product of the United Nations Conference on Environment and Development, 1/ the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, signed at Helsinki on 17 March 1992, 2/ and the Convention on Environmental Impact Assessment in a Transboundary

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1/ Agenda 21 (Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, vol. 1 (A/CONF.151/26/Rev.1 (vol. I)/United Nations publication, Sales No. 93.I.8)): "The widespread scarcity, gradual destruction and aggravated pollution of freshwater resources ... demand integrated water resources planning and management" (ibid., para. 18.3). To respond to this situation, Agenda 21 stresses the importance of "holistic management of freshwater" (ibid., para. 18.6), based on a balanced consideration of the needs of people and the environment. By inclusion of the notion of a "holistic" approach the Special Rapporteur is not departing from a fundamentally anthropocentric approach, but rather seeking to recognize that in the long run that which harms flora and fauna impoverishes humankind. Agenda 21 does not attempt to grapple in any detail with the international or transboundary implications of these concerns but rather leaves it to the ILC to come up with the framework for the aspect of the necessary global response to the identified problems.

2/ International Legal Materials, vol. XXXI, No. 6, November 1992, p. 1312.

Context, signed at Espoo, Finland, on 25 February 1991. 3/ It is, however, the Special Rapporteur's view that nothing in these instruments requires fundamental change in the text of the draft as it stands after completion of the first reading. The main impact of these instruments is to underline the importance of the Commission getting on with its work and avoiding taking a narrow view of what is comprehended by the topic.

5. The Special Rapporteur will confine this, his initial report, to parts I and II of the draft, except to the extent that issues or comments of Governments with regard to other parts affect or potentially affect parts I and II.

I. ISSUES OF A GENERAL CHARACTER

A. Draft convention or model rules

6. The Special Rapporteur does not believe that it is always necessary for the Commission to defer to the end the question of the form a work should take. Indeed, in the present case as well as others in related fields, it may expedite the work to resolve this issue at the earliest practicable stage, as several Governments have suggested in their comments. 4/ At a minimum, a brief preliminary exchange on this point would seem appropriate before any further drafting is undertaken. Conversely, if there is a determined insistence to defer the question of form to a later stage, the Special Rapporteur would not wish to delay substantive work by insisting on resolving the issue of form at this stage.

7. So far as the views of the Special Rapporteur are concerned, there is much to be said for both approaches, i.e. a framework convention and model rules. The utility of the former approach is a function, in large measure, of the width and breadth of its ratification; the utility of the latter approach largely a function of the strength and depth of the endorsement of the rules that the Commission is prepared to recommend and the General Assembly is likely to endorse. There would, in short, seem to be little point in advocating the framework convention approach absent some expectation of widespread acceptance and, even more so, no defensible point in advocating any other approach at this stage unless such advocacy is combined with a willingness to support a recommendation for very strong endorsement of the work product by the General Assembly. It can also be argued that a model law would facilitate including more specific guidance. To the extent this is so, it is at least in part offset by the vaguer nature of any obligation flowing from the instrument. If the model law approach were to be adopted, it would be useful for the commentaries, to the extent possible, to be expanded in order for States to conclude more readily when they are dealing with statements de lege lata and when not. The Special Rapporteur recognizes the difficulty of this last suggestion.

3/ Document E/ECE/1250, reprinted in International Legal Materials, vol. XXX, No. 3, May 1991, p. 800.

4/ See the comments by the United Kingdom and Canada in documents A/CN.4/447 and Add.1 respectively.

B. Dispute settlement

8. The Special Rapporteur would also like to call particular attention to the fact that a number of Governments have urged the Commission to review the question of including dispute settlement provisions. 5/ The Special Rapporteur shares in full the views of his predecessor that, in the light of the nature of the issues, it would be an important contribution for the Commission to recommend a tailored set of provisions on fact-finding and dispute settlement in the event it decides to recommend a draft treaty and, arguably, if it opts for model rules as well.

9. The following comments on specific articles are to be understood as being without prejudice to the question of form.

II. ISSUES RELEVANT TO PART I (INTRODUCTION) OF THE DRAFT ARTICLES

Article 1. Scope of the present articles

10. There does not appear any basis in the text, the commentary or the comments of Governments to require changes in this article or even its commentary, though in the latter connection it might be worth noting explicitly in the commentary that the enjoyment of the riches of an ecosystem is as much a use thereof as any other. Some Governments, in their comments, would reopen the question of the term "watercourses". The Special Rapporteur sees no useful purpose served at this late stage and in view of the compromise reached, in revisiting the pros and cons of using the term "drainage basin". The suggestion that the term "transboundary waters" be used in the light of its use in the ECE Convention referred to above 6/ seems to the Special Rapporteur a matter of drafting since, in his view, no substantive difference exists between the terms used in article 1 and the term "transboundary waters" as used in the ECE Convention.

Article 2. Use of terms

11. The Special Rapporteur has, in the interest of building on what has been achieved, with one exception resisted the temptation to tinker with article 2. The Special Rapporteur recommends that the phrase "flowing into a common terminus" in subparagraph (b) be deleted. The notion of "common terminus" does not seem to add anything beyond possible confusion to what is covered by the rest of the subparagraph and, if retained, the phrase risks the creation of artificial barriers to the scope of the exercise. Were the Special Rapporteur to yield to the temptation to tinker, it would be in the direction of including

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5/ See the comments by Costa Rica, Greece and Switzerland in document A/CN.4/447.

6/ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Legal Materials, vol. XXXI, No. 6, November 1992, p. 1312.

"unrelated" confined groundwater. 7/ In the event that preliminary exchanges in the Commission indicate a receptivity to such a change, the Special Rapporteur would be pleased to draft accordingly. It does not seem that such a change would require much, if any, change to any other articles. On balance, the article, as it stands, seems a viable compromise between two conceptual approaches which at the theoretical level clash, but which in practice must and can be harmonized. Subject to the one or possibly two of the questions discussed above, it is recommended that the Commission treat article 2 as a valid working hypothesis for the second reading and revert to it only to the extent that work on subsequent articles uncovers an unexpected need to re-examine article 2. The definition of the term "pollution" currently contained in article 21 could usefully be transferred to article 2. Such a shift is helpful to what the Special Rapporteur proposes for article 7 but is not essential, and acceptance of such a shift in no way implies agreement to or enhances the utility of any change in part II or part III of the current draft.

Article 3. Watercourse Agreements

12. The Special Rapporteur believes that one change is advisable in article 3, namely, the replacement of the word "appreciable" by the word "significant". The comments of Governments articulate their reasons for suggesting this change in a number of ways, including the practice to date in roughly comparable instruments. 8/ The two arguments which the Special Rapporteur finds particularly convincing are: (1) the word "appreciable" has two quite different meanings, i.e., (a) capable of being measured, and (b) significant; (2) since the commentary makes clear that "appreciable" is to be understood as "significant", it would be preferable for the article to so state rather than for it to be necessary to read the commentary to understand the meaning of the term. The Special Rapporteur believes this change to article 3 should be understood as implying such a change throughout the draft. 9/ The complexity and risk of confusion of using one term in, for example, articles 3 and 4 and another term in article 7 far outweighs any benefit that might derive from any such an attempt at hyper-refined tuning.

Alternative A

"2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such

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7/ For an excellent discussion of the limitations of the approach taken, see Hayton, Robert D. "Observations on the International Law Commission's Draft Rules on the Non-Navigational Uses of International Water Courses: Articles 1-4", Colorado Journal of International Environmental Law and Policy, vol. 2 (1992), pp. 37-38. The comments by Governments submitted on behalf of the Nordic countries, Spain and the United Kingdom contained in document A/CN.4/447 urge a similar approach.

8/ Comments urging this change were made, inter alia, by Germany, Switzerland, the United Kingdom, the United States (see A/CN.4/447) and by Canada (see A/CN.4/447/Add.1).

9/ That is to say, in articles 4 (2), 7, 12, 18 (1), 21 (2), 22 and 27 (2).

an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use of one or more other watercourse States of the [waters of the] 10/ watercourse."

Alternative B

"2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not cause significant harm to the use by one or more other watercourse States of the [waters of the] watercourse."

13. The perceived advantage of alternative B is the deletion of the word "extent". The function of this deletion is to make totally clear on the face of the text that the harm can be localized and still significant. If this draft is accepted for this reason, it would be advisable to make a drafting change in the current article 4 (2) by replacing the phrase "may be affected to an appreciable extent" by the phrase "may incur significant harm". There do not appear to be any other changes required by alternative B that are not required by alternative A, i.e., articles 7, 12, 18 (1), 21 (2), 22 and 28 (2).

14. The suggestion of some Governments in their comments that this article should also contain the notion that becoming party to the convention will not affect existing watercourse agreements may not be without problems and does not seem necessary. The Commission is not in a position to know with any certainty what bilateral or even multilateral agreements there are or whether some may be inconsistent with the fundamental premises of the draft. While there is nothing in the current text which would or should rule out any subsequent agreements, whether consistent with the current text or not, it seems a bit much to presume the continued validity of lex posterior inconsistent with the current draft absent some indication of intent to that end by the State or States concerned. It hardly conduces to the stability of the regime if some assume that lex posterior is overtaken and others that, contrary to the normal rules regarding successive treaties, it is not. States which decide to become party to the current draft can be expected to be fully knowledgeable about existing conventions or arrangements to which they are party. States so situated are in a position to avoid any unintended application of this convention in a variety of ways, including a clear statement of intent or understanding with regard to some or all existing agreements to which it is party at the time they sign or become party to the current treaty. A general statement to this effect at the time of signing or ratifying would suffice. This would avoid uncertainty. Attention is also directed to paragraph 3 of article 3 as currently drafted. It might in theory be possible to add to "characteristics and uses" the notion of agreements, thus making the paragraph read:

10/ Since "watercourse" is defined as a "system of ... waters" it seems unnecessary to repeat the reference to "waters". The Drafting Committee should consider this simplification throughout the draft.

"3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics, uses of, or existing agreements concerning a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements or reaching an understanding."

15. Such a change would avoid the blank-check concern expressed above. In the light of the framework nature of the current text which foresees that specific situations are likely to be the subject of particular arrangements, there may be some merit in including language to this effect. It may, however, be an unnecessary complicating of the draft in the light of the means by which States can protect themselves in particular cases. The suggested redraft is, moreover, a diversion of the main purpose of paragraph 3 of article 3 which is to provide for developments which take place after States become party to the current draft rather than to take account of pre-existing circumstances. Nevertheless, a redraft of paragraph 3 of article 3 along the lines indicated could, in the Special Rapporteur's view, be made without adverse effect and no additional drafting changes to other articles appear necessary. The Special Rapporteur would defer to the Drafting Committee as to the utility of such a change.

16. There also are various suggestions made in the comments of States to reorder the articles. The suggestions reflect the view that the draft is first and foremost a framework for cooperation, with agreements watercourse States may enter into being but one possible means to this end. It is the Special Rapporteur's view that the movement of articles 8 and 26 ahead of article 3 would have no effect on the substance of the draft but would make the flow of the articles more logical. The removal of articles 8 and 26 from parts II and III respectively does not appear to create any problems for these sections. The Special Rapporteur consequently recommends that the Drafting Committee seriously consider reordering. 11/

Article 4. Parties to watercourse agreements

17. The Special Rapporteur believes that article 4 as drafted is appropriate and, other than consequential drafting adjustments in the light of changes to article 3 ("significant" vice "appreciable"), does not recommend any changes. Paragraph 1 covers the situation in which an agreement relating to the entire watercourse is involved, and paragraph 2 covers a case in which only a portion of the watercourse is affected.

18. While the term "applies to" in paragraph 1 is doubtless not the only way to make the distinction, it should be clear that "applies to" relates to the scope of the agreement and is not synonymous with and does not serve the same function as "affects appreciably". Rather, what the text says is that, if there is such an agreement being negotiated, all watercourse States are entitled to

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11/ At the time article 26 is considered in substance, it will be necessary to examine the extent to which the terms "equitable and reasonable", "rationale and optimal" and "sustainable development" are sufficiently clearly synonymous as to avoid creating uncertainty or confusion. There are other suggestions concerning the content of article 26 in the comments of Germany, Turkey, the United Kingdom, the United States and Switzerland (see A/CN.4/447).

participate without any requirement of establishing that they will be appreciably affected. It is, in effect, a presumption and one that the Special Rapporteur considers entirely appropriate and in keeping with the thrust of the overall draft. It would seem inappropriate not to include all watercourse States in the former case and equally inappropriate in the case covered by paragraph 2 to insist on the inclusion of watercourse States not affected by the agreement. The deletion of paragraph 2, as suggested in the comments of Governments, would have the effect of creating the latter inappropriate situation, which would indeed be likely to burden lower riparian States unduly. It would not be an extremely difficult drafting endeavour to merge the two paragraphs with phrases such as "in whole or in part" and "to the extent it is affected thereby". No discernible benefit is apparent to the Special Rapporteur from such a redrafting, and the resulting paragraph would be heavy and more difficult to comprehend than the current text.

III. ISSUES RELEVANT TO PART II (GENERAL PRINCIPLES) OF THE DRAFT ARTICLES

A. General comments

19. As has been indicated by various comments and commentators, articles 5 and 7 provide a key element of the entire draft. Some suggestions would eliminate article 7 or tip the balance more clearly in favour of article 5 and make "equitable and reasonable" virtually the sole criteria for use, i.e., subordinate article 7 to article 5. Others would regard appreciable or significant harm in all cases as evidence of inherently inequitable and/or unreasonable use and implicitly or explicitly subordinate article 5 to article 7. The current text of the articles themselves is not without ambiguity on this crucial issue and on the nature of the responsibility of the States from which the harm flows.

20. While these issues, in particular the nature of the responsibility of the affecting State, are clarified to some extent by the commentary, it is submitted that a better job can be done to clarify these issues in an acceptable manner in the text of the articles themselves. To this end, the Special Rapporteur proposes a revision of article 7. The intended result of the revision is a regime in which equitable and reasonable use is the determining criterion except in cases of pollution as defined in the draft articles. In the case of pollution, article 5 is subordinated to article 7 subject to the subordination being defeasible by a clear showing of extraordinary circumstances, i.e., in effect a rebuttable presumption.

21. The Special Rapporteur is aware that such a revision in article 7 in no way diminishes the desirability of making articles 5 and 6 as clear as possible. The Special Rapporteur has, however, found no way of adding detailed guidance to article 5 that would make sense in a framework agreement. In some cases territorial apportionment was agreeable to the watercourse States, 12/ in

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12/ Indus Water Treaty of 19 September 1960. See United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation (ST/LEG/SESR.B/12), p. 300.

others periodic rotation, 13/ or sharing the benefits of a hydroelectric facility, apportionment or allotment of uses, compensation arrangements, etc. Each of these applications of reason and equity are specific to the facts of the particular situation and thus do not seem susceptible to being recommended in a framework treaty as being of general utility. It is possible and indeed likely that a commentary of some greater length could provide a description of the possibilities States could consider in reaching equitable and reasonable results. This is clearly a major area in which the problems could be alleviated by provision for third-party involvement should the States concerned be unable to reach a mutually acceptable solution.

B. Comments on specific articles

Article 5. Equitable and reasonable utilization and participation

22. No change is recommended.

Article 6. Factors relevant to equitable and reasonable utilization

23. None of the changes that have been suggested by the comments of Governments seem compelling to the Special Rapporteur in the light of: the contents, inter alia, of the existing articles, including in particular the logic of the entire draft and article 6 (d) concerning existing uses; article 21 (1) concerning the quality of the water; and of article 6 (c), 6 (f) and article 10 (2) and the suggested revised article 7 so far as situations of particular dependence are concerned. These comments are without prejudice to the consideration of article 6 in connection with the consideration of the substance of article 26, which the Special Rapporteur is not ready to comment upon at this time.

24. Paragraph 2 of the article seems a sufficiently particular case and to require sufficiently specific action to merit retention even though articles 8 and 10 (2) arguably impose a like obligation. Moreover, if there is to be any reconsideration of the inclusion of third-party involvement in this part of the draft, article 6 (2) may be as good a hook to hang it on as any.

Article 7. Obligation not to cause appreciable harm

25. Pursuant to the above general comment introducing this part of the report, the following redraft of article 7 is proposed:

> "Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States, absent their agreement, except as may be allowable under an equitable and reasonable use of the watercourse. A use which causes significant harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless there is: (a) a clear showing of special circumstances indicating a compelling need for ad hoc

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13/ See Acte final de la délimitation de la frontière internationale des Pyrénées entre la France et l'Espagne, signé à Bayonne, le 11 juillet 1868, ibid., p. 674.

adjustment; and (b) the absence of any imminent threat to human health and safety."

Article 8. General obligation to cooperate

Article 9. Regular exchange of data and information

Article 10. Relationship between uses

26. At the present time the Special Rapporteur is inclined to recommend no changes in these articles. The Special Rapporteur notes with a measure of sympathy the expression of concern by some Governments about the generality of article 8 and recognizes that the remainder of the draft only partly ameliorates the problem. The Special Rapporteur will continue to reflect on ways of making article 8 more precise without detracting from the ability of the draft as a whole to serve as a framework relating to many varied situations. The Special Rapporteur notes in this connection that the Commission has already considered the matter in some detail and concluded "that a general formulation would be more appropriate". 14/ The Special Rapporteur does not believe it prudent or legally accurate to attempt to apply the principle of good faith expressly to part of an agreement and does not believe it prudent to add the notion of good-neighbourliness to one provision of an instrument such as the one before the Commission and, in any event, does not believe such additions would appreciably, significantly or importantly decrease the generality of the article.

14/ Yearbook ... 1988, vol. II (Part Two), p. 41, document A/43/10, para. (2) of commentary to article 9.